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2016 MAR 24 AM 8:42

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

Pre-MUR 574

DATE RECEIVED: July 15, 2014

DATE ACTIVATED: August 19, 2015

**EXPIRATION OF SOL:**

Earliest: June 27, 2016

Latest: October 24, 2016

**SOURCE:**

*Sua Sponte* Submission

**RESPONDENTS:**

Richard Tisei

Tisei Congressional Committee and

Brian Cresta in his official capacity as  
treasurer

**RELEVANT STATUTES AND  
REGULATIONS:**

52 U.S.C. § 30104

52 U.S.C. § 30125

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.3

11 C.F.R. § 104.3(a), (b)

11 C.F.R. § 110.3(d)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

Federal candidate Richard Tisei and his principal campaign committee, Tisei Congressional Committee and Brian Cresta in his official capacity as treasurer (the "Federal Committee"), filed a *sua sponte* submission with the Federal Election Commission ("Commission") concerning possible violations of the Federal Election Campaign Act of 1971,

as amended ("the Act").<sup>1</sup> In their submission, Respondents indicate that in 2011, Tisei's state campaign committee (the "State Committee") made \$30,540 in payments to staff and consultants for work that may qualify as federal "testing the waters" activity that should have been paid for, in part, and reported by the Federal Committee.<sup>2</sup> Based on the available information, there is reason to believe that Tisei and the Federal Committee used non-federal funds in a federal election and failed to report those payments, in violation of 52 U.S.C. §§ 30125(e)(1)(A) and 30104.<sup>3</sup> We pursued this matter through Fast-Track Resolution<sup>4</sup> and have now completed negotiations with the Respondents. We now recommend that the Commission open a Matter Under Review, accept the attached negotiated Conciliation Agreement, and close the file in this matter.

## II. FACTUAL SUMMARY

Tisei served in the Massachusetts House of Representatives and State Senate from 1985 through 2011 and was the Republican nominee for Lieutenant Governor in 2010.<sup>5</sup> He also ran unsuccessfully for Congress for Massachusetts's 6th Congressional District in 2012 and 2014.<sup>6</sup>

<sup>1</sup> See Policy Regarding Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), 72 Fed. Reg. 16,695 (Apr. 5, 2007) ("*Sua Sponte* Policy").

<sup>2</sup> Tisei ran unsuccessfully for Lieutenant Governor in Massachusetts during the 2010 election cycle. See <http://www.ocpf.us/Filers/Index>.

<sup>3</sup> We do not propose including the State Committee as a Respondent in this matter or as a party to the Conciliation Agreement because it terminated on March 3, 2015. See Closing Letter from Massachusetts Office of Campaign and Political Finance to Melissa Lucas, Treasurer, Tisei Committee (Mar. 3, 2015), <http://www.ocpf.us/Filers/Index>.

<sup>4</sup> See OGC Memorandum (Oct. 15, 2015) (Tisei *et al.*).

<sup>5</sup> [http://ballotpedia.org/Richard\\_Tisei](http://ballotpedia.org/Richard_Tisei); Tisei *Sua Sponte* Submission at 1 (Jul. 15, 2014), Pre-MUR 574 (Richard Tisei, *et al.*) ("*Sua Sponte*").

<sup>6</sup> See Tisei FEC Form 2, Statement of Candidacy (Nov. 12, 2011 and Oct. 25, 2013).

1 During those congressional campaigns, the State Committee continued to file state disclosure  
2 reports and maintained funds in its bank account.<sup>7</sup>

3 The *Sua Sponte* identifies payments the State Committee made for work that qualifies as  
4 federal "testing the waters" activity on behalf of the Federal Committee. The largest amount at  
5 issue involves payments made in five installments in 2011 to a political consulting firm,  
6 Finkelstein & Associates ("Finkelstein"), totaling \$25,540.<sup>8</sup> The submission also identified a  
7 \$2,500 payment the State Committee made to Ashley Korb, the State Committee's finance  
8 director, on October 20, 2011, and a \$2,500 payment to Scott Conway, a staff assistant, on  
9 October 24, 2011. The Federal Committee did not disclose any of these payments on its reports  
10 filed with the Commission.<sup>9</sup>

11 According to Respondents, in 2011, after his defeat in the Lieutenant Governor election,  
12 Tisei contemplated running for office again but could not decide which office to pursue.<sup>10</sup> In  
13 addition to running for Congress, Tisei considered running for Governor, Lieutenant Governor,  
14 Secretary of State, and Treasurer.<sup>11</sup> Tisei states his decision was complicated because the  
15 Massachusetts Legislature redrew its federal congressional districts and did not announce them  
16 until November 7, 2011.<sup>12</sup>

<sup>7</sup> When he ran for Congress, Tisei was working in real estate and no longer serving in state office, but the State Committee still held cash balances between \$40,460.97 and \$78,422.60 throughout 2011. See <https://www.facebook.com/RichardTisei/info?tab=overview>; <http://northruprealtors.com/history/>; Tisei Committee Reports, Massachusetts Office of Campaign & Political Finance, <http://www.ocpf.us/Filers/Index>.

<sup>8</sup> The State Committee paid Finkelstein & Associates \$5,540 on June 27, 2011, \$5,000 on July 6, 2011, \$5,000 on August 29, 2011, \$5,000 on September 13, 2011, and \$5,000 on October 21, 2011.

<sup>9</sup> See Federal Committee, 2011 Year-End Report.

<sup>10</sup> *Sua Sponte* at 2.

<sup>11</sup> Supp. *Sua Sponte* at 1 (Apr. 13, 2012).

<sup>12</sup> *Sua Sponte* at 2.

1 The submission explains that Tisei hired Finkelstein to help him decide whether to run  
2 for office again or stay in the private sector.<sup>13</sup> Finkelstein's work for Tisei included  
3 commissioning a poll and analyzing fundraising data from the 2010 gubernatorial election, but  
4 there was no written agreement outlining Finkelstein's services.<sup>14</sup> Respondents provided an  
5 invoice and e-mail from Finkelstein to Tisei from August 2011 that references fees for  
6 "consulting services," but this document does not describe those services further.<sup>15</sup> Respondents  
7 state they could not estimate how much of Finkelstein's work was attributable to the federal  
8 campaign, but maintain that the federal portion was likely small.<sup>16</sup>

9 The *Sua Sponte* also identifies payments that the State Committee made to two staff  
10 members, Ashley Korb and Scott Conway: \$2,500 each in October 2011 for activities related to  
11 federal "testing the waters" activity. According to the submission, Korb was the State  
12 Committee's finance director and later worked for the Federal Committee.<sup>17</sup> She was paid  
13 \$2,500 for analyzing fundraising data from the 2010 Lieutenant Governor's race.<sup>18</sup> Conway was  
14 a staff assistant during Tisei's campaign for Lieutenant Governor and after that campaign ended,  
15 he continued to drive Tisei to events across the state at which Tisei apparently participated both  
16 to support the Republican Party and to help him decide whether he should run for state or federal

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2; Supp. *Sua Sponte* at 1-2 (Apr. 13, 2015); Supp. *Sua Sponte* at 2 (May 14, 2015). Respondents explain that Finkelstein's poll asked general questions and tested name recognition, but they could not locate a copy of the poll or provide samples of the poll questions. *Sua Sponte* at 2. Respondents state that because Tisei was not a federal candidate during the time when these events took place, they deleted many documents as a matter of course. Supp. *Sua Sponte* at 1 (May 14, 2015).

<sup>15</sup> Supp. *Sua Sponte* at Ex. A (May 14, 2015).

<sup>16</sup> Supp. *Sua Sponte* at 2 (Apr. 13, 2015).

<sup>17</sup> *Sua Sponte* at 2; Supp. *Sua Sponte* at 2 (Apr. 13, 2015).

<sup>18</sup> Supp. *Sua Sponte* at 2 (Apr. 13, 2015).

1 office.<sup>19</sup> The State Committee paid Conway \$2,500 for driving Tisei. Like Korb, Conway later  
2 became a paid staff member for the Federal Committee. A *Boston Globe* article that was  
3 published 12 days after the Respondent's *Sua Sponte* also raised questions about the same  
4 payments identified in the submission.<sup>20</sup> Respondents were familiar with this press report during  
5 discussions with this Office. Respondents initially stated that they did not believe that the 2011  
6 payments violated the Act and Commission regulations, but were self-reporting the activity "out  
7 of an abundance of caution."<sup>21</sup>

### 8 III. LEGAL ANALYSIS

9 The Act and Commission regulations require committee treasurers to file reports of  
10 receipts and disbursements in accordance with the provisions of 52 U.S.C. § 30104.<sup>22</sup> The  
11 Commission has created a limited exemption to the definitions of "contribution" and  
12 "expenditure" for testing the waters activity, allowing individuals to conduct certain activities  
13 designed to evaluate a potential candidacy.<sup>23</sup> Permissible testing the waters activities include,

<sup>19</sup> *Id.*

<sup>20</sup> See David Scharfenberg, *Officials Appear to Misuse Mass. Campaign Funds*, BOSTON GLOBE (July 27, 2014), available at <http://www.bostonglobe.com/metro/2014/07/26/tisei-others-appear-misuse-state-campaign-funds/laDY2hVmDjZFEdfgl04QfN/story.html>. The article included a summary of the Tisei campaign's response to questions about the matter and noted that the campaign had reached out to the FEC for "guidance." *Id.* Apparently, this *Sua Sponte* submission is the request for guidance referred to in the article. The article also identified payments to vendors for possible testing the waters activity related to the 2014 election cycle: a \$2,063.53 payment to Swiftcurrent Strategies on January 30, 2013, and a \$2,000 payment to Sumner 360-Eleanor Rollings on February 13, 2013. Respondents maintain that these were legitimate State Committee expenses, and they were incurred soon after Tisei lost his 2012 federal election, when he did not know whether he would run again in a federal election. See E-mail from Elizabeth Beacham White, Counsel to Tisei and Federal Committee (Nov. 9, 2015 04:47 EST). Without information contradicting the Respondents' claims and because these expenses are somewhat modest, we do not recommend the additional use of Commission resources to investigate these payments.

<sup>21</sup> *Sua Sponte* at 1.

<sup>22</sup> See 52 U.S.C. § 30104(a)(1) and 11 C.F.R. § 104.1(a).

<sup>23</sup> See 11 C.F.R. §§ 100.72, 100.131; Explanation and Justification for Final Rules on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9592, 9593 (March 13, 1985).

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1 but are not limited to, conducting polls, telephone calls, and traveling to determine the viability  
2 of the potential candidacy.<sup>24</sup> An individual who is testing the waters need not register or file  
3 disclosure reports with the Commission unless and until the individual subsequently decides to  
4 run for Federal office or conducts activities that indicate he or she has decided to become a  
5 candidate.<sup>25</sup> All funds raised and spent for testing the waters activities are, however, subject to  
6 the Act's limitations and prohibitions, and all reportable amounts from the beginning of the  
7 testing the waters period must be included on the first financial disclosure report filed by a  
8 committee, even if the funds were received or expended prior to the current reporting period.<sup>26</sup>

9 Additionally, the Act prohibits federal candidates, their agents, and entities directly or indirectly  
10 established, financed, maintained, or controlled by federal candidates from soliciting, receiving,  
11 directing, transferring, or spending funds in connection with an election for federal office, including  
12 funds for any federal election activity, unless the funds are subject to the limitations, prohibitions, and  
13 reporting requirements of the Act.<sup>27</sup> Commission regulations also prohibit the transfer of funds or assets

<sup>24</sup> See 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>25</sup> Once an individual becomes a "candidate" under the Act, he or she has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission, and the principal campaign committee must then file a Statement of Organization within ten days of its designation and file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b). See 52 U.S.C. §§ 30102(e)(1), 30103(a); 11 C.F.R. § 101.1(a).

<sup>26</sup> See 11 C.F.R. §§ 101.3, 104.3(a), (b).

<sup>27</sup> 52 U.S.C. § 30125(e)(1)(A).

1 from a candidate's non-federal campaign committee to his or her federal campaign committee.<sup>28</sup>

2 Respondents acknowledge that Tisei was actively exploring a federal candidacy, among  
3 other options, when the State Committee paid Finkelstein, Korb, and Conway the amounts  
4 identified in the *Sua Sponte* submission, just before he announced his 2012 candidacy in  
5 November 2011. Those payments, made from June through October 2011, were for services that  
6 constituted, at least in part, federal testing the waters activity.<sup>29</sup> Because the State Committee  
7 paid for federal activity, Respondents violated 52 U.S.C. § 30125 by receiving non-federal funds  
8 from the State Committee.

9 Furthermore, the Federal Committee failed to report receipts and disbursements related  
10 to the testing the waters activity, in violation of 52 U.S.C. § 30104. The Federal Committee's  
11 first disclosure report, the 2011 Year-End Report, did not disclose any payments to Finkelstein,  
12 Korb, or Conway. It also did not disclose any payments to, or in-kind contributions from the  
13 State Committee.

<sup>28</sup> 11 C.F.R. § 110.3(d); Transfers of funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36345 (Aug. 12, 1992) (Explanation and Justification). *See e.g.*, MUR 6267 (Paton for Senate) (Paton's federal committee received prohibited transfer of funds when Paton's state senate committee paid for polling and a survey benefitting his federal campaign); MUR 5646 (Cohen for New Hampshire) (Cohen's federal committee received prohibited transfer of funds when Cohen's state committee paid for start-up expenses related to his U.S. Senate campaign); and MUR 5426 (Dale Schultz for Congress) (Schultz's federal committee received prohibited transfer of funds when the Schultz state committee paid for expenses that the candidate incurred in connection with his federal election).

<sup>29</sup> The polling Finkelstein conducted qualifies as testing the waters activity. *See Factual & Legal Analysis* at 5-6. MUR 6196 (Kennedy) (concluding that having discussions with political consultants to determine the viability of a potential candidacy and commissioning a poll to assess name recognition constituted "testing the waters" activity); *see also* Advisory Op. 1981-32 at 2-4 (concluding that hiring political consultants to assist with advice on the potential and mechanics of constructing a national campaign organization and employing a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign were within the scope of the testing the waters exemption).

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For the reasons discussed above, we recommend that the Commission accept the executed Conciliation Agreement attached to this Report.

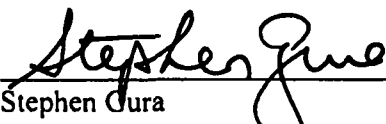
**V. RECOMMENDATIONS**


1. Open a Matter Under Review;
2. Accept the attached Conciliation Agreement with Richard Tisei, Tisei Congressional Committee and Brian Cresta in his official capacity as treasurer;
3. Approve the appropriate letter; and
4. Close the file.


Daniel A. Petalas  
Acting General Counsel

Dated: 3.23.16

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